

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER and DANNY TROXELL,
Plaintiffs,
v.
ARNOLD SCHWARZENEGGER, et al.,
Defendants.

No. C 05-03286 CW (PR)

ORDER DENYING PLAINTIFFS'
MOTIONS FOR LEAVE TO FILE
A SECOND AMENDED COMPLAINT
AND TO HAVE SECOND AMENDED
COMPLAINT DEEMED TO BE
SUPPLEMENTAL COMPLAINT
(Docket Nos. 94 and 155)
AND ORDER REGARDING
BRIEFING SCHEDULE

On August 11, 2005, Plaintiffs filed their complaint in this action. On January 30, 2006, the parties stipulated to allow Plaintiffs leave to file a first amended complaint (FAC). (Docket Nos. 21 and 22). On August 30, 2006, Defendants filed a motion to dismiss. (Docket No. 75). On November 13, 2006, Plaintiffs moved for leave to file a second amended complaint (SAC) in which they sought to add two defendants and two causes of action. (Docket No. 94). On June 14, 2007, the Court issued an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Plaintiffs' Motion for Leave to File a SAC (June 14, 2007 Order). (Docket No. 140). The Court denied without prejudice Defendants' motion to dismiss based on the statute of limitations because Defendants had not had an opportunity to address the arguments regarding continuing violations or equitable tolling that Plaintiffs had raised in their supplemental opposition. Also, in the June 14,

1 2007 Order, the Court denied Plaintiffs' request for leave to add
2 two defendants and ordered Defendants to file any opposition to
3 Plaintiffs' motion to add two causes of action and to address in
4 the opposition any statute of limitations issue regarding
5 Plaintiffs' due process claim arising from Defendants' Aryan
6 Brotherhood (AB) gang validation procedure. On July 13, 2007,
7 Defendants filed their opposition. Also on July 13, 2007,
8 Plaintiffs filed a motion for leave to have the Court deem their
9 SAC a supplemental complaint. (Docket No. 155). On September 7,
10 2007, Defendants' attorney filed a letter in which he stated that
11 he believed that filing an opposition to Plaintiffs' motion to deem
12 their SAC a supplemental complaint would be premature until the
13 Court ruled on Plaintiffs' motion for leave to file the SAC.
14 (Docket No. 169). Having considered all the papers filed by the
15 parties, the Court DENIES Plaintiffs' request to file a SAC and
16 DENIES as moot Plaintiffs' motion to deem their SAC a supplemental
17 complaint.

18 BACKGROUND

19 In their FAC, Plaintiffs alleged the following seven causes of
20 action: (1) violation of their First Amendment right of freedom to
21 associate arising from being housed in the Secured Housing Unit
22 (SHU) for allegedly associating with the AB gang; (2) violation of
23 their First Amendment right of freedom of speech arising from the
24 denial of certain magazines; (3) violation of their Fifth Amendment
25 freedom against self-incrimination arising from the debriefing
26 requirement imposed by the California Department of Correction and
27 Rehabilitation (CDCR) and of their Fifth and Fourteenth Amendment

1 right to procedural and substantive due process of law arising from
2 their inability to get released from the SHU; (4) violation of the
3 Eighth Amendment prohibition of cruel and unusual punishment, also
4 arising from the debriefing requirement; (5) violation of the Ex
5 Post Facto clause of the United States Constitution for retention
6 in the SHU on indeterminate status based upon gang association,
7 violation of the Due Process Clause of the Fourteenth Amendment due
8 to their SHU status and lack of access to prison programs which
9 prevent them from being granted parole, and violation of the Equal
10 Protection Clause of the Fourteenth Amendment because of different
11 treatment of white SHU inmates; (6) negligence; and (7) an
12 intentional tort.

13 In their motion to dismiss, Defendants sought to dismiss
14 Plaintiffs' first, third, fourth and fifth causes of action based
15 upon Plaintiffs' failure to satisfy the administrative exhaustion
16 requirement. The Court dismissed all causes of action for failure
17 to exhaust with the exception of the following: (1) the second
18 cause of action for a First Amendment violation premised on
19 Defendants' failure to allow Plaintiffs access to certain
20 magazines; (2) due process claim based on Defendants' procedure for
21 determining whether Plaintiffs are active or inactive gang members;
22 (3) the sixth cause of action for negligence; and (4) the seventh
23 cause of action for an intentional tort. See June 14, 2007 Order
24 at 24. The Court found that Plaintiffs' due process claim was
25 exhausted because Ashker's appeals numbered 01-2335 and 04-2600 and
26 Troxell's appeal numbered 88-1657 addressing CDCR's procedures for
27 establishing gang validation and inactive gang status had been
28

1 exhausted.

2 On September 20, 2007, in an Order Granting in Part and
3 Denying in Part Plaintiffs' Motion for Reconsideration (Docket No.
4 169), the Court held that Ashker's claims for prospective
5 injunctive relief against the Board of Prison Hearings (BPH) based
6 on violations of the ex post facto clause of the Constitution and
7 violation of Ashker's liberty interests in parole were exhausted
8 and could go forward. See September 20, 2007 Order at 8.

9 In the motion for leave to file an SAC, Plaintiffs seek to add
10 two claims: (1) a First Amendment claim based on the theory that
11 the policy requiring prisoners to become informants in order to be
12 released from the SHU violates their constitutional right not to
13 speak; and (2) an Eighth Amendment claim based on the theory that
14 prolonged isolation in the SHU adversely affects Plaintiffs' mental
15 health.

16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 15(a) provides that leave of
18 the court allowing a party to amend its pleading "shall be freely
19 given when justice so requires." Leave to amend lies within the
20 sound discretion of the trial court, which discretion "must be
21 guided by the underlying purpose of Rule 15--to facilitate
22 decisions on the merits rather than on the pleadings or
23 technicalities." United States v. Webb, 655 F.2d 977, 979 (9th
24 Cir. 1981). Thus, Rule 15's policy of favoring amendments to
25 pleadings should be applied with "extreme liberality." Id.; see
26 also DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir.
27 1987).

Four factors are relevant to whether a motion for leave to amend should be denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party. See Foman v. Davis, 371 U.S. 178, 182 (1962). However, these factors are not of equal weight; specifically, delay alone is an insufficient ground for denying leave to amend. Webb, 655 F.2d at 980. Futility of amendment, by contrast, can alone justify the denial of a motion for leave to amend. Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). A proposed amendment is futile "if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). In other words, if the proposed amended complaint cannot withstand a motion to dismiss, it should be denied as futile. Id.

DISCUSSION

I. Supplemental Claims

Defendants argue that Plaintiffs' two supplemental claims are futile because they are based on the same facts as Plaintiffs' third and fourth causes of action which the Court previously dismissed for lack of exhaustion.

It appears that Plaintiffs' new First Amendment claim, the violation of their claimed right to keep silent, is based upon facts similar to those alleged in their original claims for violation of their Fifth Amendment right against self-incrimination and of their procedural and substantive due process rights arising from their continued retention in the SHU. In the June 14, 2007 Order, the Court dismissed these claims for failure to exhaust.

1 See June 14, 2007 Order at 17-18. It appears that the new Eighth
2 Amendment claim is based upon facts similar to those alleged in
3 Plaintiffs' original Eighth Amendment claim of cruel and unusual
4 punishment arising from the debriefing requirement and the above-
5 mentioned due process claims. In the June 14, 2007 Order, the
6 Court dismissed Plaintiffs' Eighth Amendment claim as well as the
7 due process claims for lack of exhaustion. See June 14, 2007 Order
8 at 18-19. Plaintiffs do not show that their two new claims have
9 been exhausted. In fact, in their reply brief, Plaintiffs explain
10 that research on mental illness as a result of long-term isolation
11 in the SHU is only recent and thus, they were not aware of this
12 claim until recently. See Reply at 3-4. Therefore, it would be
13 futile to add these claim because they would be dismissed for lack
14 of exhaustion; Plaintiffs' motion to file supplemental claims is
15 DENIED. Plaintiffs' motion to deem the SAC a supplemental
16 complaint is DENIED as moot.

17 II. Statute of Limitations Defense to Due Process Claims
18 Arising From AB Gang Validation Procedures

19 In the June 14, 2007 Order, the Court denied without prejudice
20 Defendants' motion to dismiss on statute of limitations grounds but
21 allowed Defendants to address the issue in their opposition to
22 Plaintiffs' motion to amend the complaint. See June 14, 2007 Order
23 at 25. In their supplemental opposition to Defendants' motion to
24 dismiss, Plaintiffs had argued that their claims based on AB gang
25 validation are not barred by the statute of limitations and even if
26 they were, equitable tolling or the doctrine of continuing
27 violations would apply.
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1 The applicable statute of limitations for § 1983 claims is the
2 forum State's statute of limitations for personal injury actions.
3 Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). The forum
4 State's law on equitable tolling is also applied to § 1983 claims.
5 Id. Effective January 1, 2003, California's statute of limitations
6 for personal injury actions was increased from one to two years.
7 Id. (citing Cal. Civ. Proc. Code § 340(3)). Because Plaintiffs'
8 complaint was filed on August 11, 2005, the two-year limitations
9 period applies to their § 1983 claims. California law also
10 provides for the tolling of the statute of limitations for two
11 years based on the disability of imprisonment. Id. (citing Cal.
12 Civ. Proc. Code § 352.1(a)). Therefore, claims based on events
13 that occurred since August 11, 2001 are timely.

14 Defendants concede that under California law, Plaintiffs had
15 four years to bring § 1983 claims and thus, Ashker's due process
16 claim challenging the procedures that were used to determine his
17 inactive gang status and his indeterminate SHU status, based on
18 exhausted appeals 01-2335 and 04-2600, are not barred by the
19 statute of limitations. However, Defendants argue that Troxell's
20 similar due process claim, which was exhausted in appeal 88-1657,
21 is barred by the statute of limitations because it is based on
22 events that occurred prior to August 11, 2001.

23 Plaintiffs argue that Troxell's claim is timely due to the
24 application of equitable tolling. Under California's equitable
25 tolling doctrine, "a plaintiff's pursuit of a remedy in another
26 forum equitably tolls the limitations period if the plaintiff's
27 actions satisfy these factors: (1) timely notice to the defendants
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1 in filing the first claim; (2) lack of prejudice to the defendants
2 in gathering evidence for the second claim; and (3) good faith and
3 reasonable conduct in filing the second claim." Cervantes v. City
4 of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993). The doctrine
5 "focuses on the effect of the prior claim in warning the defendants
6 in the subsequent claim of the need to prepare a defense." Id.
7 Whether the two claims are similar is relevant to the second
8 factor: prejudice to the defendant. Id.

9 Although Plaintiffs argue that Troxell's appeal 88-1657 tolled
10 the statute so that his claim is timely, they do not provide the
11 time period during which Troxell's administrative appeal was
12 pending. And even if Troxell's 1988 appeal tolled the statute of
13 limitations, the appeal could not have been pending long enough to
14 overcome the fact that the complaint was filed in 2005, seventeen
15 years after Troxell filed his appeal in 1988. Therefore, equitable
16 tolling does not remedy the statute of limitations bar.

17 Plaintiffs also argue that Troxell's claim is timely because
18 it is based on a continuing violation. Before 2002, a plaintiff
19 could invoke the continuing violation doctrine by showing a series
20 of related acts, one or more of which fell within the limitations
21 period, or a systemic policy or practice of discrimination before
22 and during the limitations period. See Gutowsky v. County of
23 Placer, 108 F.3d 256, 259 (9th Cir. 1997). However, in Nat'l R.R.
24 Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), the Supreme
25 Court invalidated the related acts method of showing a continuing
26 violation, reasoning that discrete discriminatory acts are not
27 actionable if time-barred, even if they are related to acts alleged

1 in timely filed charges. However, the Supreme Court did not
2 invalidate the continuing violation theory premised on a systemic
3 policy or practice of discrimination adversely affecting the
4 plaintiff within the limitations period. Carpinteria Valley Farms
5 v. Santa Barbara, 344 F.3d 822, 829 n.3 (9th Cir. 2003).

6 In their reply brief, Plaintiffs state, "From 1988 to 1999,
7 Defendants' policy of confining prisoners classified as gang
8 members/associates to indefinite SHU terms until they snitched,
9 paroled, or died, was an [unconstitutional] policy. And at some
10 point in time Defendants began to arbitrarily enforce this policy
11 by keeping certain inmates on indefinite SHU status, while allowing
12 tens of thousands of others to be on general population status.
13 . . . And Plaintiffs have been subject to a defacto, indefinite
14 (SHU) status. . ." Reply at 10-11. This is sufficient to invoke
15 the continuing violations doctrine.¹

16 Citing Grimes v. City and County of San Francisco, 951 F.2d
17 236, 238-39 (9th Cir. 1991), Defendants argue that the continuing
18 violation doctrine doesn't apply because a mere continuing impact
19 from past violations is not actionable. Grimes, however, is
20 distinguishable from the facts here. In Grimes, the past violation
21 consisted of the discrete act of termination from employment. The
22 continuing violations doctrine does not apply to employment
23 termination claims because termination is one discrete act, even if

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25 ¹Although these statements are made in Plaintiffs' reply brief
26 and not in their complaint, the Court will not require Plaintiffs
27 to refile an amended complaint to include the appropriate
28 allegations, but will construe the complaint as if it contained
these allegations.

1 it is based upon discrimination and even if its effects are not
2 felt for years later. Id. In this case, Troxell was held in the
3 SHU, allegedly based upon an unconstitutional policy. If true,
4 this allegation would mean that Troxell was kept in the SHU, not as
5 the result of one discrete act, but as the result of a series of
6 actions taken by Defendants over time, from the time that Troxell
7 filed his appeal in 1988 to the time he filed the instant
8 complaint. Thus, the continuing violations doctrine might apply.
9 Defendants' motion to dismiss Troxell's due process claim based
10 upon statute of limitations grounds is DENIED without prejudice to
11 re-filing it with their motion for summary judgment.

12 CONCLUSION

13 Based on the foregoing, Plaintiffs' motion for leave to file a
14 SAC and motion to deem the SAC a supplemental complaint are DENIED.
15 Defendants' motion to dismiss, based on the statute of limitations,
16 Plaintiffs' due process claims arising from Defendants' AB
17 validation procedure is DENIED. The claims remaining in this case
18 are (1) violation of Plaintiffs' First Amendment right of freedom
19 of speech arising from the prohibition of certain magazines;
20 (2) violation of Plaintiffs' procedural and substantive due process
21 rights arising from Defendants' AB gang validation procedures;
22 (3) Ashker's claim for injunctive relief based on due process
23 violations in parole procedures and lack of access to prison
24 programs; (4) negligence; and (5) intentional tort.

25 In an effort to adjudicate the remaining claims more quickly,
26 the Court issues the following briefing schedule. All dispositive
27 motions must be filed no later than two months from the date of

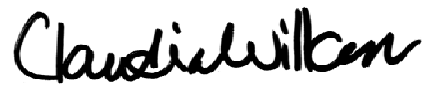
1 this order. Opposition briefs are due one month thereafter.
2 Replies are due two weeks thereafter. Because this case is over
3 two years old and Plaintiffs have already amended their complaint,
4 Plaintiffs may not file any additional motions to amend or
5 supplement their complaint. Any new claims must be filed in a new
6 complaint.

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8 IT IS SO ORDERED.

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10 Dated: 12/26/07



CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 ASHKER ET AL et al,

Case Number: CV05-03286 CW

5 Plaintiff,

CERTIFICATE OF SERVICE

6 v.

7 SCHWARZENEGGER ET AL et al,

8 Defendant.
_____ /

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on December 26, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Danny Troxell B-76578
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Dated: December 26, 2007

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk